

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SABRINA CHIN, on behalf of herself and all others
similarly situated,

Plaintiff,

-against-

RCN CORPORATION,

Defendant.

Civil Action No. 08-CV-7349
(RJS)

ANSWER

Electronically Filed

Defendant RCN Corporation (“RCN”), by its attorneys, Bingham McCutchen LLP, answers the complaint (“Complaint”) filed by Sabrina Chin (“Plaintiff”) on behalf of herself and all others similarly situated as follows:

1. RCN denies each and every allegation in paragraph 1 of the Complaint, except admits that plaintiff Sabrina Chin (“Plaintiff”) purports to bring a class action against RCN on behalf of herself and all others similarly situated.

2. RCN denies each and every allegation in paragraph 2 of the Complaint, except admits that certain of RCN’s marketing materials have, either presently or in the past, used the words “fast and uncapped” and “unrivaled speeds.”

3. RCN denies each and every allegation in paragraph 3 of the Complaint.

4. RCN denies each and every allegation in paragraph 4 of the Complaint, except admits that RCN was a subject of a blog post in *Wired Magazine* in December 2006.

5. RCN denies each and every allegation in paragraph 5 of the Complaint.

6. RCN denies each and every allegation in paragraph 6 of the Complaint, except admits that the Federal Communications Commission issued a memorandum and order on August 1, 2008 in connection with the network management practices of Comcast Corporation.

7. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 7 of the Complaint.

8. RCN denies it has engaged in “unauthorized practices,” denies that fees have been paid to RCN by its subscribers for services that they did not receive, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 8 of the Complaint.

9. RCN denies each and every allegation in paragraph 9 of the Complaint.

10. RCN denies each and every allegation in paragraph 10 of the Complaint, except admits that it conducts substantial business in this District.

11. RCN denies each and every allegation in paragraph 11 of the Complaint.

12. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 12 of the Complaint, except admits that Plaintiff is an RCN Internet subscriber.

13. RCN denies that it has “approximately 500,000 customers,” and otherwise admits the allegations set forth in paragraph 13 of the Complaint.

14. RCN denies each and every allegation in paragraph 14 of the Complaint, except admits that RCN has a registered trademark in the phrase “Connect to something more,” and has used the following phrases in advertising for its Internet services: “offer you the fastest residential cable modem speed bar none,” “unrivalled speeds far exceed any other Internet provider in your area such as Verizon, SBC, Service Electric, Comcast or Time Warner,” and “so you can enjoy the Internet the way it was intended to be – fast and uncapped.”

15. RCN admits the allegations set forth in paragraph 15 of the Complaint.

16. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 16 of the Complaint.

17. RCN denies each and every allegation in paragraph 17 of the Complaint.

18. RCN denies each and every allegation in paragraph 18 of the Complaint.

19. RCN denies each and every allegation in paragraph 19 of the Complaint.

20. RCN denies each and every allegation in paragraph 20 of the Complaint.

21. RCN denies each and every allegation in paragraph 21 of the Complaint.

22. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 22 of the Complaint.

23. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 23 of the Complaint.

24. RCN denies each and every allegation in paragraph 24 of the Complaint.

25. RCN denies each and every allegation in paragraph 25 of the Complaint.

26. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 26 of the Complaint.

27. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 27 of the Complaint.

28. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 28 of the Complaint.

29. RCN denies each and every allegation in paragraph 29 of the Complaint.

30. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 30 of the Complaint.

31. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 31 of the Complaint.

32. RCN repeats and realleges its responses to paragraphs 1 through 31 of the Complaint as if fully set forth at length herein.

33. RCN denies each and every allegation in paragraph 33 of the Complaint.

34. RCN denies each and every allegation in paragraph 34 of the Complaint.

35. RCN denies each and every allegation in paragraph 35 of the Complaint.

36. RCN denies each and every allegation in paragraph 36 of the Complaint.

37. RCN repeats and realleges its responses to paragraphs 1 through 36 of the Complaint as if fully set forth at length herein.

38. RCN denies each and every allegation in paragraph 38 of the Complaint, except admits that Plaintiff purports to bring a cause of action pursuant to Virginia's Consumer Protection Act, Virginia Code § 59.1 *et seq.*

39. RCN denies each and every allegation in paragraph 39 of the Complaint.

40. RCN denies each and every allegation in paragraph 40 of the Complaint.

41. RCN denies each and every allegation in paragraph 41 of the Complaint.

42. RCN denies each and every allegation in paragraph 42 of the Complaint.

43. RCN denies each and every allegation in paragraph 43 of the Complaint.

44. RCN denies each and every allegation in paragraph 44 of the Complaint.

45. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 45 of the Complaint, except admits that Plaintiff purports to seek statutory damages in an amount of \$500 per person on behalf of herself and similarly situated class members.

46. RCN denies each and every allegation in paragraph 46 of the Complaint, except admits that Plaintiff purports to seek that this Court award her costs and attorneys' fees pursuant to Virginia Code § 59.1-204(B).

47. RCN denies each and every allegation in paragraph 47 of the Complaint, except admits that Plaintiff purports to seek that this court enjoin RCN from continuing the acts and practices alleged in the Complaint.

48. RCN repeats and realleges its responses to paragraphs 1 through 47 of the Complaint as if fully set forth at length herein.

49. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 49 of the Complaint.

50. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 50 of the Complaint.

51. RCN denies each and every allegation in paragraph 51 the Complaint.

52. RCN repeats and realleges its responses to paragraphs 1 through 51 the Complaint as if fully set forth at length herein.

53. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 53 of the Complaint.

54. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 54 of the Complaint.

55. RCN denies each and every allegation in paragraph 55 of the Complaint.

56. RCN denies each and every allegation in paragraph 56 of the Complaint.

57. RCN repeats and realleges its responses to paragraphs 1 through 56 of the Complaint as if fully set forth at length herein.

58. RCN denies each and every allegation in paragraph 58 of the Complaint.

59. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 59 of the Complaint, except denies that RCN has engaged in fraudulent, false and/or deceptive practices.

60. RCN denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 60 of the Complaint.

61. RCN denies each and every allegation in paragraph 61 of the Complaint.

62. RCN denies each and every allegation in paragraph 62 of the Complaint.

63. RCN denies each and every allegation in paragraph 63 of the Complaint.

64. RCN denies each and every allegation in paragraph 64 of the Complaint.

65. RCN repeats and realleges its responses to paragraphs 1 through 64 of the Complaint as if fully set forth at length herein.

66. RCN denies each and every allegation in paragraph 66 of the Complaint.

67. RCN denies each and every allegation in paragraph 67 of the Complaint.

68. RCN denies each and every allegation in paragraph 68 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

The Complaint, and each and every cause of action therein, fails to state a claim upon which relief can be granted against RCN.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable terms and conditions of RCN's Customer Terms and Conditions, RCN's Acceptable Use Policy, and other applicable RCN Policies and Disclaimers.

THIRD AFFIRMATIVE DEFENSE

Plaintiff and some or all members of the purported class lack standing to assert some or all of their claims.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are not maintainable as a class action, and Plaintiff is not an adequate, suitable or appropriate class representative.

FIFTH AFFIRMATIVE DEFENSE

This action is barred, in whole or in part, because RCN's conduct and actions were and are reasonable and lawful based on independent, legitimate business and economic justifications.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff is barred from obtaining any relief on her Complaint in that, by agreement, conduct, representations and/or omissions, Plaintiff has waived, relinquished, or abandoned any claim for relief against RCN respecting the matters which are the subject of the Complaint and the causes of action contained therein.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from obtaining any relief on her Complaint in that, by agreement, conduct, representations and/or omissions, Plaintiff is estopped from asserting any claim for relief against RCN respecting the matters which are the subject of the Complaint and the causes of action contained therein.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims, or some of them, are barred by applicable statutes of limitation.

NINTH AFFIRMATIVE DEFENSE

Plaintiff is barred from obtaining any relief in this action by the doctrine of laches.

TENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from obtaining any relief in this action by the doctrine of unclean hands.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred to the extent an award would constitute unjust enrichment.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff has failed to plead her claims with particularity.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any, are speculative, and thus are not recoverable.

FOURTEENTH AFFIRMATIVE DEFENSE

RCN denies the validity, appropriateness or reasonableness of Plaintiff's prayer for relief.

WHEREFORE, RCN respectfully prays for judgment as follows:

- (i) dismissing the Complaint in its entirety;
- (ii) awarding RCN its costs, disbursements, and attorneys' fees; and
- (iii) awarding RCN such other and further relief as the Court deems just and proper.

Dated: New York, New York
November 21, 2008

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